BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JAMES M. FARIAS	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,038,817
HAYES COMPANY, INC.	)	
Respondent	)	
AND	)	
	)	
NATIONAL FIRE INSURANCE COMPANY OF HARTFORD	)	
Insurance Carrier	)	

ORDER

Claimant appeals the September 25, 2008, preliminary hearing Order of Administrative Law Judge John D. Clark (ALJ). Claimant was denied benefits after the ALJ found that claimant had not proven causation, citing the report of David W. Hufford, M.D., to whom claimant was sent by the ALJ for an independent medical evaluation (IME).

Claimant appeared by his attorney, Joseph Seiwert of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, John M. Graham, Jr., of Kansas City, Missouri.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing held September 25, 2008, with attachments; the transcript of Preliminary Hearing held May 13, 2008, with attachments; and the documents filed of record in this matter.

ISSUES

Respondent raises the following issues for the Board's consideration:

1. Causation of claimant's continued low back pain.

2. All other appealable issues.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed. This matter originally went before the ALJ on May 13, 2008, for a preliminary hearing. At that time, respondent denied that claimant had suffered an accidental injury which arose out of and in the course of his employment, denied notice and denied written claim. The Order of the ALJ determines only whether claimant suffered an accidental injury which arose out of and in the course of his employment with respondent, based on the causation opinion of Dr. Hufford. The remaining issues were not addressed by the ALJ.

Claimant alleges that he suffered a series of injuries to his low back, with pain into his left leg, as the result of his work with respondent, through February 8, 2008, claimant's last day with respondent. Respondent contends claimant's ongoing back problems are the result of serious injuries suffered by claimant in 1988, when claimant jumped from a pickup truck after lifting a 45-pound air compressor, and experienced a sudden onset of pain in his back. Medical reports also indicate that claimant was digging fence post holes that day. Ultimately, claimant's problems became so significant that he sought medical treatment, coming under the care of orthopedic surgeon Robert L. Eyster, M.D. Claimant originally underwent a discectomy at L5-S1 in 1988. This was followed by a fusion at that same level in 1989. Ernest R. Schlachter, M.D., in his report of March 26, 1991, described claimant's condition as "[f]ailed back surgery times two".[1] Claimant was rated by Dr. Schlachter at 30 percent to the whole body for those injuries, and the matter was settled by Settlement Hearing on April 18, 1991. The settlement was complete and total, with claimant's right to future medical treatment and the right to review and modify the award being settled as well.

After being off work for several months, claimant returned to work for respondent, although in an accommodated job. The medical reports and clamant's testimony indicated ongoing problems with claimant's back and left leg. Claimant underwent as many as 12 epidural injections over the years, with no benefit. Claimant was under the care of Craig R. Parman, M.D., his primary care physician, for several years for pain management. He also treated with Dr. Tokala for several years, with a dorsal column spinal cord stimulator being tried. Claimant did receive some benefit from his leg pain with this stimulator treatment, but received no relief from his back pain.

Claimant's pain escalated significantly in 2005, but claimant was unable to describe any work-related activities which contributed to this worsening. He was seen

[1] P.H. Trans. (May 13, 2008), Resp. Ex. 1.

by Dr. Lewonowski, a local spine surgeon, and referred for a pain pump. This morphine pump was implanted in claimant's stomach in approximately September 2005 and is being monitored by Dr. Tokala. Even with this added pain treatment, claimant required increasing doses of pain medication, reporting that by 2008, the pump was no longer effective.[2] A lumbar CT in December 2007 displayed L4-5 degenerative disc disease with spinal stenosis from a combination of disc, ligament and osteophyte components. An earlier lumbar myelogram correlated those findings.

Clamant's job with respondent from 2005 until November or December of 2007 was as manager of the wood shop, receiving and Fence Corner, a company inside the respondent's company. Claimant stated that he was able to do that job "fine".[3] In either November or December 2007, claimant was moved to the powder coat room. He stated that this job was more physical, requiring that he climb ladders all day. He also stated he had to move booths weighing probably 1,000 pounds and 55-gallon drums of paint. Clamant stated that he began to develop numbness and tingling and sharp pains in his hip and down his left leg into his foot. Claimant stated that respondent knew of his problems and his bad back. He talked to his supervisor, Gary Walker, about the problems and ultimately was sent for a functional capacity evaluation (FCE). However, this FCE is dated January 9, 2007,[4] before claimant's job change.

On January 16, 2008, claimant was examined by occupational medicine specialist, Ronald Davis, M.D. Claimant reported to Dr. Davis that he was experiencing increased pain after getting on and off a forklift on January 2, 2008. Dr. Davis diagnosed chronic back pain and opined that there was no cause and effect relationship between claimant's condition and his work.

Claimant was referred by his attorney to physical medicine and rehabilitation specialist Pedro A. Murati, M.D., for an examination on March 26, 2008. Dr. Murati's history indicated claimant had numbness and tingling in the back of both legs and the hip, popping in both knees and ankles, burning in the left hip, constant low back pain and pain in the right elbow. Claimant told Dr. Murati that his job required he get on and off a forklift and crawl up and around to hook the forklift to the product he was moving. He did this 28 times per day and had to do heavy lifting and constant moving. Claimant described a two-day period when the second manager of the powder coat room failed to show for work. Claimant reported severe pain after those two days. But claimant did not report those

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[2] See Dr. Hufford's June 18, 2008, report at 1; see also Dr. Stein's August 12, 2008, report at 3.

[3] P.H. Trans. (May 13, 2008) at 8.

[4] It looks like that January 9, 2008, is the correct date. The date on the front page of the FCE report, January 9, 2007, appears to be a typographical error. See the last page of the FCE report which shows a date of January 9, 2008.

injuries or the increased pain to respondent for fear of losing his job. Claimant was not able to give a time period when these injuries occurred.

Dr. Murati's history indicated that claimant suffered an increase in back pain just before a July 16, 2007, examination by Dr. Parman. Claimant's pain had increased in the five days leading up to that examination. No explanation for that increase in pain was reported to Dr. Murati. Dr. Murati's report also indicated that claimant was referred for the FCE after his October 23, 2007, examination by Dr. Parman. Claimant testified at the preliminary hearing of May 13, 2008, that "HR" sent him for the FCE[5] in order to determine claimant's restrictions.

Dr. Murati diagnosed claimant with low back pain with radiculopathy and SI joint dysfunction, both of which were determined to have occurred as a result of a series of accidents while working for respondent. These injuries ended on February 8, 2008, claimant's last day with respondent.

Claimant testified that he suffered several injuries while working for respondent, none of which were reported due to claimant's fear of termination. Claimant was asked what specific injury through his last day worked in February 2008 led to the preliminary hearing in May 2008. Claimant described a specific injury while he was in a truck. When asked the date of that accident, claimant was unable to say. When asked the month of that accident, claimant was unable to say. Claimant stated that he laid in "the fetal position for Friday night, Saturday, Sunday and went back to work Monday."[6] He thought it had occurred in 2005 but then stated it was 2007. Claimant was asked how many injuries he suffered while working for respondent. He responded "several". When asked again, he specified at least six injuries. None were reported to respondent, except the injury suffered after driving the forklift for respondent.[7]

Claimant's last day with respondent was on February 8, 2008. He is not looking for employment, but has filed for social security disability. As of the preliminary hearing, no decision had been reached on his request.

Claimant's last medical treatment with Dr. Parman was the day before the May 13, 2008, preliminary hearing. Claimant was being treated for the back problems and for pain between his shoulders, which claimant stated had been in existence for six years.

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[5] P.H. Trans. (May 13, 2008) at 11.

[6] P.H. Trans. (May 13, 2008) at 15.

[7] P.H. Trans. (May 13, 2008) at 18.

The ALJ determined that since one doctor determined that claimant's injuries were not related to his employment (Dr. Davis) and another doctor determined that there was a relation (Dr. Murati), the appropriate action was to refer claimant for an independent medical evaluation (IME) with orthopedic surgeon David W. Hufford, M.D. Dr. Hufford examined claimant on June 18, 2008. At that time, claimant discussed the injuries from 1987 forward with significant treatment, including the two back surgeries. Dr. Hufford attempted to elicit information regarding specific injuries to claimant's low back in the 20 years since the fusion. He was unable to obtain any information from claimant regarding specific injuries or a specific series of injuries while claimant worked with respondent. Dr. Hufford noted that claimant's medical treatment since the early 1990s has been paid for by claimant's wife's health insurance. His report noted that claimant alleged that, when claimant returned to work after the FCE and based on the FCE recommendations regarding essentially sedentary work, claimant was fired from his job.

Dr. Hufford diagnosed claimant with chronic low back pain but was unable to connect claimant's ongoing problems with his employment with respondent. Claimant was unable to provide any specific or discrete injury information. Dr. Hufford did note that claimant was a smoker and this was a most significant risk factor for the development of lumbar degenerative disc disease. He also noted a well documented connection between lumbar fusion and adjacent level disease. Dr. Hufford was unable to find any causation for a specific work-related incident or repetitive activity that has caused claimant's continued low back pain. Claimant has never been pain free from the date of the lumbar fusion forward.

Claimant was then referred to board certified neurologist Paul S. Stein, M.D., for an examination on August 12, 2008. Claimant's attorney explained that the unfavorable report from Dr. Hufford necessitated the extra evaluation. Claimant reported to Dr. Stein that after the surgeries, he was better. He reported that he was trimming trees, building fence and unloading trucks for respondent. Claimant denied any other history of injuries. He did tell Dr. Stein of several flare-ups of his back over the years. The one episode he could not "shake off" was unloading heavy plant stands from a semi in January of 2007 or 2008.

Claimant was diagnosed with disc disease at L5-S1 from early injuries and resulting surgeries. The history indicated claimant got along relatively well after the fusion surgery except for some flare-ups over the years until suffering increasing pain in the last year or two. Dr. Stein noted he was provided no medical records from the time of the original settlement until 2007. Dr. Stein found that claimant's work activities subsequent to the settlement contributed to the deterioration of claimant's back. The structural changes, in particular at L4-5 with the degenerative changes, more likely were related to the preexisting

situation but symptomatology has been exacerbated by the work activity. Dr. Stein went on to state that:

> If medical records currently unavailable were to show that Mr. Farias did not ultimately have a good recovery from his second surgery, continued to experience a high level of chronic back and left lower extremity pain with a chronic need for medical attention and narcotic medication, such would cast doubt on the amount of exacerbation by the work activity."[8]

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[9]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[10]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[11]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental

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[8] P.H. Trans. (September 25, 2008), Cl. Ex. 1 at 6-7.

[9] K.S.A. 2007 Supp. 44-501 and K.S.A. 2007 Supp. 44-508(g).

[10] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[11] K.S.A. 2007 Supp. 44-501(a).

> injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[12]

It is well established under the Workers Compensation Act in Kansas that when a worker's job duties aggravate or accelerate an existing condition or disease, or intensify a preexisting condition, the aggravation becomes compensable as a work-related accident.[13]

Claimant's low back injury history is significant. With two surgeries, at least 12 epidural injections and a multitude of pain medications, including the insertion of a morphine pump, claimant has displayed long-term back problems which, as Dr. Schlachter noted, constitutes "[f]ailed back surgery times two". While Dr. Murati ties these current problems to claimant's job with respondent, Dr. Davis and Dr. Hufford do not. Additionally, Dr. Stein, claimant's second expert, while tying the ongoing problems to the work, was provided with a less than accurate injury and pain history. As Dr. Stein stated, if the history of claimant's lack of pain and problems is inaccurate, then the connection between the job with respondent and claimant's ongoing problems becomes uncertain.

Additionally, this claimant has described a multitude of injuries while working for respondent. However, when pressed, he was unable to identify any specific date of accident and, at times, was not even able to identify the month during which he was allegedly injured.

When the testimony of a claimant is questioned, the administrative law judge is in the unique position to see the live testimony and to ascertain whether the witness is credible. It is this opportunity to observe live testimony that causes the Board to, at times, give some credence to the opinion of the administrative law judge when determining a witness's credibility. Here, the ALJ appears to have found claimant's credibility to be lacking. This Board Member agrees. With the conflict in the date, time and events leading to these alleged injuries, and with claimant's long history of back problems, this Board Member agrees that claimant has failed to prove that his ongoing physical problems are the result of any injuries suffered while working for respondent.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[14] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member,

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[12] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

[13] *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

[14] K.S.A. 44-534a.

as permitted by K.S.A. 2007 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant has failed to satisfy his burden of proving that he suffered an accidental injury or injuries which arose out of and in the course of his employment with respondent. The Order of the ALJ denying claimant benefits should be affirmed.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge John D. Clark dated September 25, 2008, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of December, 2008.

HONORABLE GARY M. KORTE

c: Joseph Seiwert, Attorney for Claimant
John M. Graham, Jr., Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge